

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
JANICE RUBIN ROSS	:	
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Periods June 1, 1988	:	
through May 31, 1989 and March 1, 1990 through	:	
February 28, 1991.	:	DETERMINATION
	:	DTA NOS. 812383
	:	AND 812384

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In the Matter of the Petition	:	
of	:	
JANICE RUBIN ROSS	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1987, 1988 and	:	
1989.	:	

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Petitioner, Janice Rubin Ross,<sup>1</sup> 19707 Turnberry Way, Aventura, Florida 33180, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods June 1, 1988 through May 31, 1989 and March 1, 1990 through February 28, 1991. She also filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1987, 1988 and 1989.

A hearing was held before Frank W. Barrie, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on August 17, 1994 at

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<sup>1</sup>Mrs. Ross was previously known as Janice Rubin, the name under which the petitions were originally filed.

1:30 P.M. Petitioner submitted an initial brief, and the Division of Taxation filed a brief in opposition to the petition. Petitioner's reply brief was received on March 20, 1995, which date began the six-month period for the issuance of this determination. Petitioner appeared by John R. Serpico, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Robert J. Jarvis, Esq., of counsel).

### ISSUES

I. Whether petitioner, as a corporate president and majority shareholder, was a person required to collect tax under Tax Law § 1131(1) so that she is personally liable for sales tax determined due from Janice and Abe, Inc. for the periods June 1, 1988 through May 31, 1989 and March 1, 1990 through February 28, 1991.

II. Whether petitioner, as a corporate president and majority shareholder, was a person required to collect, account for and pay over income taxes withheld by Janice and Abe, Inc. from the wages of its employees and, if so, whether she willfully failed to do so.

### FINDINGS OF FACT

The Division of Taxation ("Division") issued the following eight notices of determination (Division's Exhibit "B"), each dated August 31, 1991, against petitioner asserting tax, penalty and interest:

Notice <u>Number</u>	Sales Tax <sup>2</sup> Quarter <u>Ending</u>	Tax Asserted <u>Due</u>	<u>Penalty</u>	<u>Interest</u>	Total Asserted <u>Due</u>
S910831723M	August 31, 1988	\$22,224.76	\$6,667.36	\$9,419.79	\$38,311.91
S910831724M	November 30, 1988	25,789.00	7,736.70	9,848.37	43,374.07
S910831725M	February 28, 1989	25,959.62	7,787.87	8,867.81	42,615.30
S910831726M	May 31, 1990	12,928.48	3,939.35	2,374.40	19,242.23
S910831727M	August 31, 1990	23,274.56	5,120.37	3,062.81	31,457.74

It is observed that the notices were not issued in sequence by sales tax quarter. Further, sales taxes were asserted due for the period consisting of four sales tax quarters, June 1, 1988 through May 31, 1989, not for the three sales tax quarters of June 1, 1989 through February 28, 1990, and then asserted due for the four sales tax quarters of March 1, 1990 through February 28, 1991. The record does not disclose whether the corporation remitted sales tax for the three sales tax quarters running from June 1, 1989 through February 28, 1990. Neither party placed any emphasis or importance on this break in the period at issue.

S910831728M	May 31, 1989	32,449.50	4,326.59	1,397.53	38,173.62
S910831729M	November 30, 1990	38,429.13	5,764.35	1,962.50	46,155.98
S910831730M	February 28, 1991	38,429.13	5,380.06	1,895.13	45,704.32

The notices of determination each advised petitioner that she was:

"liable individually and as officer of Janice and Abe Inc. under sections 1131(1) and 1133 of the Tax Law for . . . taxes determined to be due in accordance with section 1138(a) of the Law. Section 1138(a)(1) of the Tax Law provides that if necessary, the tax due may be estimated on the basis of external indices . . . ."

However, the Division's answer (Division's Exhibit "F") indicated that some of the amounts asserted as due were not estimated, but rather were based upon sales tax returns filed by Janice and Abe, Inc.:

"7. States that, for each of the sales tax quarters ended 8/31/88, 11/30/88, 5/31/89, 11/30/90, and 2/28/91, the corporation did not file sales tax returns on or before the due date thereof. Hence, the Division issued delinquency assessments . . . to the corporation for each of those quarters, in the respective amounts of \$22,224.76, \$25,789.00, \$32,449.50, \$38,429.13, and \$38,429.13 . . . .

"8. States that, for each of the sales tax quarters ended 4/28/89 and 8/31/90, the corporation filed sales tax returns after the due date therefor, but did not remit the tax shown due on each said return. Hence, the Division issued assessments . . . to the

corporation for the nonremitted amounts shown on the filed returns, in the respective amounts of \$25,959.62 and \$23,274.56 . . . .

"9. States that, for the sales tax quarter ended 5/31/90, the corporation filed a sales tax return showing tax due of \$27,928.48 but remitted only \$15,000.00 with said return, leaving a balance due of \$12,928.48. Accordingly, an assessment . . . was issued to the corporation in the amount of \$12,928.48 . . . ."

At the hearing, the Division's representative noted:

"At the time the answer was drafted, it appeared that some of the returns for at least three or four of the quarters were not filed at all and assessments were made. Since that time the returns were filed, which had the effect of reducing the assessment for the corporation and [petitioner] for at least three of the quarters." (Tr., p. 19.)

The Division's Exhibit "L" is described by the Division's representative as:

"a sheet which shows the corporation assessment numbers for the various sales tax quarters; on the right-hand column are the officer assessment numbers which correspond. I will note . . . that the annotations in blue ink on this copy are my annotations based on the returns that were filed for the reduction for the three [quarters]" (tr., p. 21).

This sheet shows the following reductions in sales tax asserted due:

<u>Period Ended</u>	<u>Original Tax Asserted Due</u>	<u>Reduced Tax Asserted Due</u>
May 31, 1989	\$32,449.50	\$10,444.93
November 30, 1990	38,429.13	26,461.50
February 28, 1991	38,429.13	24,807.34

The Division also issued three notices of deficiency (Division's Exhibit "H"), each dated August 30, 1991, against petitioner asserting penalty due of \$3,445.08, \$13,780.32 and \$3,250.31 for the years 1987, 1988 and 1989, respectively. On the same date, the Division issued three corresponding statements of deficiency advising petitioner that these deficiencies resulted from the assertion of penalty against petitioner under Tax Law § 685(g) as a "person required to collect, truthfully account for and pay over the tax" pursuant to Tax Law § 685(n) on behalf of Janice and Abe, Inc. for the withholding tax periods December 1, 1987 through December 31, 1987, December 1, 1988 through December 31, 1988 and January 1, 1989 through March 31, 1989, respectively.

Janice and Abe, Inc.

Janice and Abe, Inc. operated a series of three restaurants on the upper east side of Manhattan at the street address of 1290 Third Avenue, which is located near 74th Street. A review of the eight sales tax returns filed for the respective tax quarters at issue (Division's Exhibit "M") shows that the corporation's restaurant operation at this location which, according to petitioner, could seat approximately 60 persons, reported sales which exceed \$1,000,000.00 per year if annualized:

<u>Period Ended</u>	<u>Taxable Sales<sup>3</sup></u>	<u>Sales and Use Taxes</u>
(1) August 31, 1988	\$269,381.00	\$22,223.93
(2) November 30, 1988	312,594.00	25,789.00
(3) February 28, 1989	314,622.00	25,959.62

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<sup>3</sup>Janice and Abe, Inc. reported the same amounts for gross sales as were reported for taxable sales. It is observed that on some of the returns the corporation was referred to as Janice and Bee, Inc., which, according to petitioner, was a clerical error. It is also observed that on the return for the period ended May 31, 1989, next to the typed corporate name of Janice and Bee, Inc., "debtor in possession" was handwritten.

(4) May 31, 1989 <sup>4</sup>	126,605.00	10,444.93
(5) May 31, 1990	338,526.00	27,928.48
(6) August 31, 1990	282,115.00	23,274.56
(7) November 30, 1990	320,745.00	26,461.50
(8) February 28, 1991	300,695.00	24,807.34

Petitioner testified that she did not have anything to do with the compilation of the figures that went into these returns, and that she did not sign any of these returns (tr., p. 47). The corporation's bookkeeper,

identified by petitioner as "Herb", signed the first three returns according to petitioner. The returns numbered four through six above show the signature of Abe Margolis.<sup>5</sup> However, petitioner pointed out that the signature of Mr. Margolis varied on these returns, and she could not identify which were, in fact, Mr. Margolis's signature. The last two returns in evidence were unsigned.

Petitioner's Involvement with  
Janice and Abe, Inc.

Petitioner operated a restaurant known as Janice's Fish Place, which could seat about 80 people, in the Greenwich Village section of Manhattan, at the street location of 570 Hudson Street, for approximately eleven years. She testified that she was forced to close her Greenwich Village restaurant when the landlord of the building where her restaurant was located refused to renew her lease. One of her customers, Abe Margolis, suggested that she run a similar restaurant at 1290 Third Avenue, the location where he had operated Abe's Steak House for many years.

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<sup>4</sup>This date was very difficult to read on the photocopy submitted into the record. However, by process of elimination, May 31, 1989 appears to be the date appearing on the return which shows taxable sales of \$126,605.00.

<sup>5</sup>The bankruptcy petition of Janice and Abe, Inc. which includes an affidavit of Mr. Margolis, shows "Margolis" as the spelling of petitioner's fellow shareholder. However, other documents in the record such as the corporation's certificate of registration for the collection of sales tax (Division's Exh "N") shows a spelling of "Margolies" which was used by the hearing reporter in preparing the transcript of the hearing.

Petitioner and Abe Margolis formed a corporation, Janice and Abe, Inc., to operate the restaurant at 1290 Third Avenue. Petitioner was named president of the corporation and owned 75% of the corporation's stock. Mr. Margolis owned the remaining 25% of the corporation's stock. According to petitioner, she invested \$80,000.00 in the corporation. The record does

not disclose what Mr. Margolis contributed to the corporation in exchange for his stock.

The Division introduced into evidence as its Exhibit "P", a letter dated July 29, 1994 of its representative to petitioner's representative requesting "copies of the corporation's Articles of Incorporation, its bylaws (as in effect for the period 1/1/87-2/28/91) corporate resolutions concerning bank accounts, minutes of any meetings of directors or shareholders held during the relevant time period, and the names of the shareholders of the corporation during that time period and the percentage of stock owned by each." By a letter dated August 3, 1994, petitioner's representative responded:

"The corporation Janice & Abe, Inc. was a closely held small business corporation completely controlled by Abe Margolis. Mr. Margolis was a famous restaurateur with a hard nosed reputation.

"Ms. Rubin was a twenty-five (25%) [sic] percent shareholder as to ownership, and Abe Margolis seventy-five (75%) [sic] percent, but Ms. Rubin had zero percent as to control.

"Because of the nature of the corporation, no stockholder meetings were held. The by-laws and certificate of incorporation<sup>6</sup> were the boiler type that are normally issued for a restaurant and only completed for the purposes of licensing.

"Ms. Rubin was a signatory on checks even though her name was often signed by others. Abe was also a signatory."

Petitioner was unable to specify the time period during which she operated Janice's Fish Place at the new uptown location of 1290 Third

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Petitioner testified that she did not know if the corporation had bylaws or any articles of incorporation (tr., p. 56).

Avenue. Her initial testimony concerning the date on which she commenced the operation was as follows:

Attorney Serpico: "And can you tell us what happened to this [Greenwich Village] Janice's Fish House?"

Janice Rubin Ross: "The owner of the building sold it, and my lease had run out the year before and he would never renew it."

Attorney Serpico: "Could you recall what year that was?"

Janice Rubin Ross: "It was '86 or '87."

Attorney Serpico: "What is your best recollection?"

Janice Rubin Ross: "or '8; it was years ago" (tr., p. 24).

Similarly, her initial testimony was that she became associated with Abe Margolis "around '86 or '87, but I don't remember" (tr., p. 27).

Petitioner also was hesitant in her recollection of the specific length of time that she operated Janice's Fish Place on behalf of Janice and Abe, Inc.:

Attorney Serpico: "And how long did you operate the fish place?"

Janice Rubin Ross: "A very short time; a few months because it didn't do any business."

Attorney Serpico: "When you say a few months, three, four months?"

Janice Rubin Ross: "Yes, like three months" (tr., p. 28).

Later in the hearing, the Administrative Law Judge questioned petitioner in an attempt to obtain more specific information concerning the period during which petitioner operated Janice's Fish Place at the new location:

Administrative Law Judge: "1290 Third Avenue seems like a good location. Why didn't it work?"

Janice Rubin Ross: "Those people wanted steak."

\* \* \*

Administrative Law Judge: "And that [the failure of Janice's Fish Place uptown] happened rapidly?"

Janice Rubin Ross: "Immediately. They didn't come in."

\* \* \*

Administrative Law Judge: "What happened? You say it happened [immediately]. . . ."

Janice Rubin Ross: "It just never took off. It was never busy. Janice's in the Village was always a busy place."

\* \* \*

Administrative Law Judge: "And your testimony is that sign [Janice's Fish House] came down pretty quickly?"

Janice Rubin Ross: "Fast."

Administrative Law Judge: "As you are thinking about it this afternoon, can you give me a sense of the number of months it was open as a fish place?"

Janice Rubin Ross: "No. But it wasn't long."

Administrative Law Judge: "Was it more than a year?"

Janice Rubin Ross: "No. Much less."

Administrative Law Judge: "Was it --"

Janice Rubin Ross: "I don't even think it was six months" (tr., pp. 72-74).

The Administrative Law Judge asked petitioner if there was a "document that you might have that would refresh your recollection [of] the date that [Janice's Fish Place] stopped operating" (tr., p. 75). No such document was produced by petitioner after she was permitted to discuss with her representative this request of the Administrative Law Judge. The Administrative Law Judge pointed out to petitioner that the first period for which the State claimed no sales tax was paid was the period June 1, 1988 through August 31, 1988, i.e., the summer of 1988 (tr., p. 76). Petitioner could not "remember" whether she stopped operating Janice's Fish Place uptown prior to such period (tr., p. 77).

It is observed that subsequent to the Administrative Law Judge's questioning of petitioner, the Division during the continuation of its cross-examination introduced into evidence as its Exhibit "N" a certificate of registration for sales tax purposes dated December 18, 1986 signed by petitioner, as president of Janice and Abe, Inc. This certificate noted that the corporation intended to begin business in New York State in December 1986. It is also noted that the certificate disclosed the names of two owners: petitioner, who was the



president of the corporation, and Abraham Margolis, for whom no corporate title was indicated.

Petitioner's testimony was less hesitant concerning the sequence of restaurants that Janet and Abe, Inc. operated at 1290 Third Avenue: first her fish restaurant (Janice's Fish Place), then an Italian Restaurant (A' Salute) for more than a year (tr., p. 29) and finally the reestablishment of a steakhouse (Abe's Steak House).

Petitioner testified that once Janice's Fish Place failed at the uptown location she "didn't have anything to do with it" (tr., p. 29). Initially, petitioner testified that Abe Margolis brought in an individual named Frank Catenaccio to manage the Italian restaurant and that an individual named Jerry Zell was not involved in operating the Italian restaurant. However, in response to a leading question from her representative, petitioner answered affirmatively to the question, "But he [Jerry Zell] was there at the same [time] that Frank Catenaccio was?" (tr., p. 32).<sup>7</sup> To add further to the confusion, petitioner introduced into

evidence as her Exhibit "1" an affidavit dated December 23, 1992 of Frank Catenaccio that made no reference to his running an Italian restaurant at 1290 Third Avenue on behalf of Janice and Abe, Inc. Rather, he stated as follows in his affidavit:

"1. That I was employed as a manager by Janice and Abe Inc., also known as Abe's Steak House from 1987 to 1988.

"2. That the operation was commenced in 1987 by Janice Rubin and Abe Margolis.

"3. That the operation commenced as a fish style restaurant based upon Janice Rubin's expertise in operating a fish style restaurant.

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<sup>7</sup>Petitioner's representative later in his questioning assumed such fact again:

Attorney Serpico: "During all this time when Frank Catenaccio and Jerry Zell were operating the restaurant first as an Italian restaurant and then as a steakhouse, what were your duties?"

Janice Rubin Ross: "I had no duties. I had no duties after they changed it from Janice's Fish House to A' Salute; they told me I couldn't do anything there" (tr., p. 33).

"4. That it was not successful and terminated within six (6) months.

"5. That Mr. Margolis changed the operation to a steak house and then hired Jerry Zell to operate the restaurant.

"6. That Janice Rubin was not instrumental in operating the restaurant or its financial affairs.

"7. That Abe Margolis operated the restaurant until May 3, 1989 when the corporation filed a petition in bankruptcy under Case No. 89B-10976, which bankruptcy was confirmed on August 9, 1990."

Later during her direct testimony, petitioner became more forceful in placing responsibility on Jerry Zell, but appears to have forgotten that she earlier agreed with her attorney that Mr. Zell was there at the same time as Frank Catenaccio:

Attorney Serpico: "Then after A' Salute closed and Abe's Steakhouse opened, who took care of the financial affairs of the corporation?"

Janice Rubin Ross: "Then Abe -- he got rid of Frank and he brought in this Jerry Zell and his wife Irma, and Jerry ran the restaurant and Irma was the bookkeeper" (tr., p. 41).

Petitioner's statement, as noted in Finding of Fact "11", that once her fish restaurant failed she didn't have anything to do with the operation of a restaurant by Janice and Abe, Inc., is contradicted by other evidence in the record. Petitioner's Exhibit "2" consists of 44 business checks of Janice and Abe, Inc.,<sup>8</sup> checks with dates running from May 20, 1987 to August 17, 1988. Petitioner initially testified "No" to the question, "And in looking at those checks, is the payee and the amount and the date in your handwriting?" (tr., p. 35). However, she then identified one check, number 0825, dated May 21, 1987, in the amount of \$249.15 to a payee named Ammirati<sup>9</sup> as one she had written out, and also indicated that she saw "a number of them" (tr., p. 35) which she had written out, including check number 823, dated May 21, 1987,

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<sup>8</sup>When asked by her representative whether these 44 checks were a "sampling" of the corporate checks, petitioner responded that she "would imagine so" (tr., pp. 38-39).

<sup>9</sup>Since the writing is difficult to decipher, this is a best guess based upon a review of the list of the 20 largest creditors of Janice and Abe, Inc. included in petitioner's Exhibit "3".

to ASC in the amount of \$131.76. Petitioner also noted that one check, number 820, had her signature although she "didn't make out the check" (tr., p. 35). It is somewhat troubling that petitioner's signature on check number 825 is remarkably distinct from her signature on check number 820. Petitioner also identified five checks, numbers 822, 821, 815, 816 and 810, where the

signature purporting to be hers was not, in fact, her signature.<sup>10</sup> Some of the 44 checks were signed by Frank Catenaccio, who also appears to have been authorized to sign checks, which raises some unanswered questions about the explanation given by petitioner for why she signed corporate checks after her fish restaurant failed:

Attorney Serpico: "Will you tell us why you would write out the check number 0825 if you weren't working at the premises?"

Janice Rubin Ross: "I might have gone in there and then Frank would say, 'Write this check'" (tr., p. 35)

On cross-examination, petitioner, who had been less than forthcoming on direct concerning her signing of corporate checks, was further quizzed on checks which had her signature:

Attorney Jarvis: "Is that signature on check 1034 your signature?"

Janice Rubin Ross: "Yes."

Attorney Jarvis: "Same question for check number 1059."

Janice Rubin Ross: "Yes."

Attorney Jarvis: "That is also your signature?"

Janice Rubin Ross: "Yes."

Attorney Jarvis: "How about check number 1061?"

Janice Rubin Ross: "Yes."

Attorney Jarvis: "1062?"

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<sup>10</sup>Petitioner testified that it was not until after Abe's Steak House closed that she obtained the corporate checks and discovered that someone had been signing her name.

Janice Rubin Ross: "60 isn't mine, but the others are."

Attorney Jarvis: "1061?"

Janice Rubin Ross: "1 is mine; 2 is mine; not 60."

Attorney Jarvis: "1063?"

Janice Rubin Ross: "Yes, 63."

Attorney Jarvis: "And the last one I want to ask you about, the very last check on the last page of my photocopy doesn't have a number."

Attorney Serpico: "1070."

\* \* \*

Attorney Jarvis: "Check number 1070. Is that your signature?"

Janice Rubin Ross: "Yes" (tr., pp. 53-54).

Like her confused testimony concerning her check signing activity on behalf of the corporation, petitioner's testimony concerning her drawing a salary from Janice and Abe, Inc. was also confused. First she testified that after her uptown fish restaurant closed, she did not draw a salary. However, she then testified that she did not remember whether she drew a salary after the restaurant changed its name to A'Salute, and later she testified that in 1988 she was put back on the books and drew a salary after she told Abe Margolis "that I was broke, I needed money, and to give me some of my money back" (tr., p. 41). Her salary was then either \$150.00 or \$300.00 per week, but "I don't remember" (tr., p. 42). Petitioner responded "yes" to this leading question posed by her representative, "You didn't perform any duties at all for the salary?" (tr., p. 42).

In addition, on cross-examination petitioner revealed that she applied for the liquor license on behalf of Janice and Abe, Inc. and that her status as president and 75% shareholder never changed (tr., p. 56).

#### Petitioner's Credibility

As noted in Finding of Fact "12", much of petitioner's testimony was confused and somewhat troubling in its shiftiness. Nonetheless, it should be noted that petitioner does not

appear to be a sophisticated businesswoman despite her 10 years of experience in running her own Greenwich Village restaurant. She testified that she had no training in management or a college degree and that it was "the social aspect" that attracted her to the restaurant business (tr., p. 69). When she operated her Greenwich Village restaurant, she depended on the professional assistance of her accountant. Petitioner's testimony that she did not question Abe Margolis concerning the payment of sales tax and withholding taxes because she had paid all taxes when she operated her own restaurant and "never assumed that taxes would not be paid" had a ring of truth. Petitioner's credibility was also bolstered by her candid admission that she was never refused access to the corporation's books and records. Rather, she noted, "I never asked" (tr., p. 66). Consequently, it is fair to find that petitioner's confusing testimony and shiftiness was not intentional on her part but rather was the result of her inability to recollect relevant events.

The Bankruptcy of  
Janice and Abe, Inc.

In her petition dated November 8, 1993 (Division's Exhibit "E") contesting the imposition of sales tax as well as in her other petition also dated November 8, 1993 (Division's Exhibit "J") contesting the imposition of withholding tax penalties, petitioner alleged that Janice and Abe, Inc. filed a petition in bankruptcy on May 3, 1989, and that from May 3, 1989, the trustee in bankruptcy controlled payment of all bills. As noted in Finding of Fact "1", four of the sales tax quarters at issue as well as part of the quarter ending May 31, 1989 are subsequent to the date of May 3, 1989, which petitioner alleged was when Janice and Abe, Inc. filed a petition in bankruptcy. However, as noted in Finding of Fact "2", the periods at issue for withholding tax penalties are all prior to this alleged bankruptcy date. Consequently, it is inexplicable why petitioner raised the bankruptcy of the corporation in her petition contesting the imposition of withholding tax penalties.

Petitioner introduced into evidence as her Exhibit "3" a document consisting of 26 pages described by petitioner's representative as a copy of the bankruptcy petition of Janice and Abe, Inc. Petitioner testified that she had nothing to do with its preparation and never saw the document before August 17, 1994, the date of the hearing. It is observed that a corporate

resolution dated May 3, 1989 authorizing a proceeding in Bankruptcy Court for a Chapter 11 reorganization was signed by Abraham Margolis, as secretary. It is further noted that the seal of the corporation was apparently hand-drawn by Mr. Margolis showing 1986 as the year of incorporation.

Also included in Exhibit "3" is a photocopy of a Rule 52 affidavit of Abraham Margolis which provided in relevant part as follows:<sup>11</sup>

"3. Debtor [Janice and Abe, Inc. trading as Abe's Steak House] operates a restaurant and steak house in New York City. during [sic] the recent past, absentee management was running the premises and it ran at a substantial deficit. Taxes remain unpaid. Records were poorly kept and various taxing authorities and creditors have threatened to levy. Deponent has taken on total control and discharged previous managers and it appears that the Company can and will operate profitably in the future.

"4. Debtor employs [sic] 27 people at an average monthly gross payroll of \$23,557.

"5. Total salaries paid to officers and directors are \$[left blank] per month. Debtor projects monthly net sales for the next 30 days of \$116,800 and the following major expenses:

Payroll	\$23,557
Rent	6,115
Cable TV	170
Miscellaneous items including insurance, etc.	<u>5,000</u>
Total expenses	\$38,500

This excludes the cost of food and liquor, but even with that Debtor projects a substantial profit.

\* \* \*

"7. Debtor owns no real property, but occupies premises at 1290 Third Avenue, New York City pursuant to lease dated [month unreadable] 15, 1977 at an average monthly rental of \$6,115 for a term which expires on May 31, 1992" (emphasis added).

Petitioner testified that Abe Margolis died less than a year after the bankruptcy petition was filed. Since the petition was filed on May 3, 1989, Mr. Margolis died prior to May 3, 1990.

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<sup>11</sup>The photocopy of this affidavit introduced into the record was of poor quality with the right side difficult to decipher. Missing words were filled in based on the context of prior words.

Later, petitioner remembered that Mr. Margolis died "over Labor Day weekend" (tr., p. 43). Consequently, it would appear that Mr. Margolis was no longer in control of the operation of Janice and Abe, Inc. after September 1989. Since the period at issue includes, for sales tax purposes, four quarters running March 1, 1990 through February 28, 1991, it is extremely relevant to determine who was in charge of the restaurant operation after Mr. Margolis's death. Petitioner addressed this particular factual issue modestly and once again in a confused fashion:

Attorney Serpico: "To your knowledge after May 3rd, 1989 who ran the restaurant while it was in bankruptcy?"

Janice Rubin Ross: "Jerry Zell and his wife."

Attorney Serpico: "Abe Margolis still didn't run the restaurant?"

Janice Rubin Ross: "Well, he never ran it."

\* \* \*

Attorney Serpico: "Prior to going out of business, Abe Margolis died?"

Janice Rubin Ross: "Yes."

Attorney Serpico: "Then who took over the restaurant?"

Janice Rubin Ross: "His brother, Robbie was like the, you know -- he took over Abe's overseeing duty, but it was still Jerry Zell and his wife" (tr., pp. 49-50).

Petitioner's Exhibit "3" does not identify the individual, if any, who served as a bankruptcy trustee. The papers only indicate that the Manhattan law firm of Nachamie, Hendler & Spizz were the attorneys representing Janice and Abe, Inc. as the "Debtor-in-Possession". The petitions had alleged that a bankruptcy trustee controlled the payment of all bills of the restaurant, but no specific evidence was introduced to support this allegation.

Documents Introduced by the  
Division Late in the Hearing

Late in the hearing, the Division introduced into evidence a photocopy of the 1990 form CT-3-S, New York S Corporation Franchise Tax Return, of Janice and Abe Inc. (Division's Exhibit "O") which in the shareholder information section showed petitioner with 75% of the shares and an address of 1290 Third Avenue (the restaurant's location) and Abraham Margolis with 25% of the shares and an address of 910 Fifth Avenue, New York City. In addition,

petitioner was designated as the "TMP", tax matters person, for 1990. The corporation's loss for the year of \$36,264.00 was allocated \$27,198.00 to petitioner and \$9,066.00 to Abraham Margolis.

As its Exhibit "R", the Division introduced photocopies of six sales tax returns of the corporation for quarters before the period at issue. The earliest return is for the partial period October 28, 1986 through November 30, 1986 and shows taxable sales of \$40,254.00. This return was dated December 18, 1986 and signed by petitioner. The next return dated March 20, 1987 was for the period December 1, 1986 through February 28, 1987 and shows taxable sales of \$101,837.00 and was also signed by petitioner. The next return dated September 19, 1987 was for the period June 1, 1987 through August 31, 1987 and shows taxable sales of \$142,557.00 and was also signed by petitioner. Petitioner did not sign any of the other returns. Some unidentified individual signed petitioner's name apparently without her knowledge. It would appear, based upon these earlier sales tax returns and petitioner's albeit confused testimony, that petitioner operated Janice's Fish House at the uptown location on behalf of Janice and Abe, Inc. during the period October 28, 1986 through August 31, 1987, which is prior to the periods at issue.

Petitioner submitted 14 proposed findings of fact. Proposed findings of fact "3", "4", "6", "7", "9" and "13" are accepted and incorporated into this determination.

Proposed finding of fact "1" is accepted except the ending date of the period during which petitioner operated Janice's Fish House at the uptown location is more exactly addressed in Finding of Fact "18".

Proposed finding of fact "2" is accepted except it is noted that the assessment number for the notice covering the sales tax period ending February 28, 1991 was S910831730M.

Proposed finding of fact "5" is accepted except it is noted that two separate conciliation orders were issued, one sustaining the notices of determination (sales tax) and the other sustaining the notices of deficiency (income tax).

Proposed finding of fact "8" is accepted except petitioner testified that her lease expired



in 1986, 1987 or 1988, and the record is not clear concerning the specific date that Abe Margolis brought up the matter of opening Janice's Fish Place uptown, and it might have been prior to the actual closing of the Greenwich Village restaurant operated by petitioner.

Proposed finding of fact "10" is not accepted because, as noted in Findings of Fact "11" and "12", the evidence concerning the management of the restaurants operated at the uptown location, subsequent to Janice's Fish House, is confused and conflicting.

Proposed finding of fact "11" is accepted except it is more exact to find that when petitioner assumed responsibility, taxes were paid.

Proposed finding of fact "12" is not accepted because of the use of the inexact words "forced out" to describe what happened to petitioner when her fish restaurant did not succeed at the uptown location, which is better addressed by Findings of Fact "7", "11" and "12".

Proposed finding of fact "14" is accepted except for the last sentence which is inexact and is also more in the nature of a conclusion of law because it is an ultimate finding of fact.

#### SUMMARY OF THE PARTIES' POSITIONS

Petitioner contends in her brief that, like the taxpayer in Matter of Turiansky (Tax Appeals Tribunal, April 29, 1993), she "was an officer in name only" (Petitioner's brief, p. 9). Petitioner argues that, during the period at issue, she did not have "the final word as to what bills should or should not be paid" and places emphasis on these facts:

"Petitioner did not have any day-to-day responsibilities; involvement with financial affairs; derive substantial income from the corporation; or have any say whatsoever in the operations of the corporation" (Petitioner's brief, p. 9).

With reference to petitioner's liability for unpaid withholding taxes, petitioner contends that even if she is determined to be "a responsible person based upon her stock ownership and corporate office", she did not willfully fail to collect and pay over withholding taxes (Petitioner's brief, p. 11). Rather, "[p]etitioner was a victim in this case [losing her \$80,000.00 investment] and her losses should not be further compounded by holding her responsible for the taxes" since she "was merely a shareholder/officer in name only" (Petitioner's brief, pp. 12-13).

The Division in its brief counters that "although petitioner may have delegated her

authority over the corporation's financial affairs to others, doing so does not absolve her of responsibility for her obligations" (Division's brief, p. 3; emphasis in original). Furthermore, the Division points out that, during the period at issue, petitioner signed corporate checks, drew a salary and as an individual received the benefit of the corporation's losses as a shareholder in a subchapter S corporation. The Division emphasizes that petitioner failed to establish by clear and convincing evidence the specific date when she was no longer involved in the daily operation of the business and points out "her inability at hearing to remember numerous other salient facts" (Division's brief, footnote "2"). Nonetheless, the Division argues that:

"[e]ven if petitioner had proven a specific date when she was no longer involved in the corporation's activities on a daily basis, petitioner had sufficient authority [as corporate president and majority shareholder] over the affairs of Janice & Abe, Inc. to be charged with responsibility for its tax obligations during the entire period in question" (Division's brief, p. 10).

The Division emphasizes that petitioner cannot absolve herself "from responsibility by merely disregarding [her] duties and leaving them to someone else to discharge" (Division's brief, p. 14). The Division rejects petitioner's contention that she was forced out of the business and had no access to the corporation's records because her "position as principal owner and president of the corporation gave her de facto power to implement her authority over the business" (Division's brief, p. 19). Finally, the Division notes that "[p]etitioner's failure to take any steps whatsoever to ensure that the corporation's withholding taxes were being timely paid constitutes willfulness under Section 685(g) of the Tax Law."

In her reply brief, petitioner argues that:

"[w]hile Petitioner was in name an officer and shareholder it is apparent from the actions taken in the operation of the business that the other shareholder Abe Margolies [sic] was the party with complete control of the corporation" (Petitioner's reply brief, p. 2).

In addition, petitioner points out that the corporation was in bankruptcy as of May 3, 1989, and "[a]t the very least she did not have any control after the Bankruptcy Petition was filed" (Petitioner's reply brief, p. 3). Petitioner points to the Tribunal's decision in Matter of Constantino (September 27, 1990) wherein an officer and shareholder was found not to be responsible for unpaid corporate taxes because the evidence in Constantino did not "support a

conclusion that petitioner could have acted but chose not to." Rather, in her reply brief, petitioner contends:

"[S]he did not willfully delegate her duties in the corporation, she was forced out of the operation of the business by Mr. Margolies [sic]. The only alternative she possibly had at the time was to commence an action to dissolve [sic] the corporation. If she had done so she would have lost the \$80,000.00 she invested in the corporation" (Petitioner's reply brief, p. 6).

#### CONCLUSIONS OF LAW

A. Tax Law § 1131(1) defines "persons required to collect [sales] tax" as follows:

"[E]very vendor of tangible personal property or services; every recipient of amusement charges; and every operator of a hotel. Said terms shall also include any officer, director or employee of a corporation or of a dissolved corporation, any employee of a partnership or any employee of an individual proprietorship who as such officer, director or employee is under a duty to act for such corporation, partnership or individual proprietorship in complying with any requirement of this article; and any member of a partnership" (emphasis added).

Tax Law § 1133(a) makes "every person required to collect any tax" personally liable for sales tax required to be collected.

B. The determination of whether an individual is a person under a duty to act for a business operation is based upon an examination of the particular facts of the case. In Matter of Moschetto (Tax Appeals Tribunal, March 17, 1994), the Tribunal reaffirmed the standard articulated in Matter of Constantino (supra):

"[t]he question to be resolved in any particular case is whether the individual had or could have had sufficient authority and control over the affairs of the corporation to be considered a responsible officer or employee. The case law and the decisions of this Tribunal have identified a variety of factors as indicia of responsibility: the individual's status as an officer, director, or shareholder; authorization to write checks on behalf of the corporation; the individual's knowledge of and control over the financial affairs of the corporation; authorization to hire and fire employees; whether the individual signed tax returns for the corporation; the individual's economic interests in the corporation" (Matter of Constantino, supra).

In Moschetto (supra), the Tribunal reversed the Administrative Law Judge's determination that an officer of a corporation that operated a car dealership had a duty to act for the corporation in complying with the requirements of the sales tax law. The Administrative Law Judge relied on the following factors: (1) the officer received substantial income from the car dealership; (2) he influenced the hiring of employees and supervised car salesmen; (3) he

had check-signing authority and signed checks; (4) he had signed one sales tax check; and (5) was a shareholder, a member of the board of directors and had signed an unlimited guarantee with a bank on behalf of the corporation. The Tribunal decided that the above factors relied on by the Administrative Law Judge were:

"not sufficient, given the entire circumstances of petitioner's involvement in City Chrysler, to sustain the conclusion that petitioner had a duty to act for the corporation in complying with the requirements of the sales tax law" (Matter of Moschetto, supra).

The Tribunal noted: (1) the officer received the same salary after he became a shareholder as he had when he was only a manager of service and parts and the amount of income received (\$600.00 a week in 1987 through 1989) did not suggest that he was a responsible officer (when sales tax asserted due was approximately \$400,000.00); (2) the officer did not hire and fire without the approval of a Sheldon Reynolds, who had the real authority in the business; (3) his check-signing authority and check-signing activities were circumscribed; and (4) the officer in fact had little actual authority over the corporation's affairs, in spite of his titles and investment. In summary, the Tribunal emphasized its similar decision in Matter of Constantino (supra), where it stated:

"[P]etitioner's role was essentially that of a minority investor and supervising employee who was precluded from taking actions with regard to the financial and management activities of the corporation."

C. Petitioner argues that her involvement with the restaurants operated by Janice and Abe, Inc. after Janice's Fish House failed at the uptown location was primarily limited to her \$80,000.00 investment. However, the evidence shows that petitioner continued to sign checks on behalf of the corporation even though, as noted in Finding of Fact "12", Frank Catenaccio, her alleged successor in the day-to-day operation of the restaurant, also had check-signing authority. Furthermore, it would appear that petitioner's lack of knowledge and control over financial matters was not a question of lack of authority, since she was the majority shareholder and president of the corporation, but rather by choice based upon her reliance on Abe Margolis. Unfortunately, this reliance turned out to be ill-advised because, as president of the corporation, petitioner had a fiduciary duty to the corporation (and legal authority to act for it) and,

consequently, a responsibility to act for the corporation in complying with its sales tax and withholding tax obligations (see, Matter of Martin v. Commr. of Taxation & Fin., 162 AD2d 890, 558 NYS2d 239; Matter of LaPenna, Tax Appeals Tribunal, March 14, 1991). Exceptions have been found only where the corporate officer proved that she was precluded from acting on behalf of the corporation by the acts of another (see, e.g., Matter of Turiansky, supra; Matter of Moschetto, supra; Matter of Constantino, supra). Petitioner has failed to prove such preclusion. In fact, her status as majority shareholder makes such burden of proof a nearly impossible task. The matter at hand is similar to cases where the petitioner has been the sole shareholder and officer. In such circumstances, the sole shareholder and officer is viewed as having the legal authority and duty to act on behalf of the corporation and, therefore, should be held liable for taxes due notwithstanding the fact that the taxpayer may not have exercised actual control over the corporation (Matter of Martin v. Commr. of Taxation & Fin., supra; Matter of Blodnick v. New York State Tax Commn., 124 AD2d 437, 507 NYS2d 536, appeal dismissed 69 NY2d 822, 513 NYS2d 1027; Matter of Marvin H. Mason, Inc., Tax Appeals Tribunal, July 29, 1993; Matter of LaPenna, supra).

D. With respect to the period at issue subsequent to the filing of the bankruptcy petition, it cannot be concluded that petitioner was not a person required to collect tax under Tax Law § 1131(1) for such period. After the appointment of a bankruptcy trustee, petitioner would have been under a duty pursuant to section 521 of the Bankruptcy Code (11 USCS § 521)<sup>12</sup> to

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<sup>12</sup>Section 521 of the Bankruptcy Code (11 USCS § 521) provides as follows:

"§ 521. Debtor's duties

"The debtor shall--

"(1) file a list of creditors, and unless the court orders otherwise, a schedule of assets and liabilities, a schedule of current income and current expenditures, and a statement of the debtor's financial affairs;

"(2) if an individual debtor's schedule of assets and liabilities includes consumer debts which are secured by property of the estate--

"(A) within thirty days after the date of the filing of a petition under chapter 7 of this title [11 USCS §§ 701 et seq.] or on or before the date of the meeting

cooperate with the trustee as necessary to enable the trustee to perform his duties under the bankruptcy law (11 USCS § 521[3]). Petitioner would also have been under a duty to surrender to the trustee all property of the estate and any recorded information (i.e., records) relating to the property

of the estate (11 USCS § 521[4]). The bankruptcy trustee then would have taken charge of the property of the estate, and the appointment of the trustee would have served to remove from petitioner legal authority to act for the corporation in any respect, including the corporation's compliance with its sales tax obligations. At such point, petitioner would have lacked legal authority to act for the corporation (cf., Matter of Stern, Tax Appeals Tribunal, September 1, 1988). However, there is no evidence that in the matter at hand a bankruptcy trustee was ever appointed.

E. Where a person is required to collect, truthfully account for and pay over withholding

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of creditors, whichever is earlier, or within such additional time as the court, for cause, within such period fixes, the debtor shall file with the clerk a statement of his intention with respect to the retention or surrender of such property and, if applicable, specifying that such property is claimed as exempt, that the debtor intends to redeem such property, or that the debtor intends to reaffirm debts secured by such property;

"(B) within forty-five days after the filing of a notice of intent under this section, or within such additional time as the court, for cause, within such forty-five day period fixes, the debtor shall perform his intention with respect to such property, as specified by subparagraph

(A) of this paragraph; and

"(C) nothing in subparagraphs (A) and (B) of this paragraph shall alter the debtor's or the trustee's rights with regard to such property under this title [11 USCS §§ 101 et seq.];

"(3) if a trustee is serving in the case, cooperate with the trustee as necessary to enable the trustee to perform the trustee's duties under this title [11 USCS §§ 101 et seq.];

"(4) if a trustee is serving in the case, surrender to the trustee all property of the estate and any recorded information, including books, documents, records, and papers, relating to property of the estate, whether or not immunity is granted under section 344 of this title [11 USCS § 344]; and (5) appear at the hearing required under section 524(d) of this title [11 USCS § 524(d)].

taxes and willfully fails to collect and pay over such taxes, Tax Law § 685(g) imposes on such person "a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over." Tax Law § 685(n) defines "person", for purposes of Tax Law § 685(g), to include:

"an individual, corporation or partnership or an officer or employee of any corporation . . . who as such officer, employee or member is under a duty to perform the act in respect of which the violation occurs."

Whether someone is a "person" under a duty to collect and pay over withholding taxes is similar in scope and analysis to the question of whether one is a responsible individual for sales and use tax purposes (see, Matter of Picciurro, Tax Appeals Tribunal, August 11, 1994; Matter of Chin, Tax Appeals Tribunal, December 20, 1990). Consequently, based on the analysis above concerning petitioner's status as a person required to collect sales tax on behalf of Janice and Abe, Inc., it is concluded that she was also a person required to collect, truthfully account for and pay over withholding taxes.

F. Therefore, the analysis shifts to whether petitioner's failure to withhold and pay over taxes was willful (see, Matter of Rounick, Tax Appeals Tribunal, October 17, 1991). In Rounick, the Tribunal determined that the taxpayer, although a responsible officer, did not willfully fail to remit withholding taxes:

"Petitioner [Herbert Rounick] did not have actual knowledge that the taxes had not been paid. [Mr. Rounick spent at least 50% of his time abroad performing his duties.] Further, petitioner did not recklessly disregard his duties. His delegation of authority to Mr. Cohen was reasonable in light of Mr. Cohen's experience, and his reliance on Mr. Cohen was justified given the financial arrangements DSI had. Subsequent events beyond the control of petitioner caused the withholding taxes to not be paid."

The same cannot be said herein. Rather, petitioner's failure to monitor or even inquire whether income tax withheld from the corporation's employees was being paid over to the State, as noted in Finding of Fact "13", was a reckless disregard of her duties as majority shareholder and president of the corporation.

G. The petitions of Janice Rubin Ross are denied, and the notices of determination dated August 31, 1991, as modified based upon the subsequent filing of tax returns (as indicated in

Finding of Fact "1"), are sustained, and the notices of deficiency dated August 30, 1991 are sustained.

DATED: Troy, New York  
August 3, 1995

/s/ Frank W. Barrie  
ADMINISTRATIVE LAW JUDGE